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93-1625

In The

Supreme Court of the United States

October Term, 1993

NORTH STAR ALASKA HOUSING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, and
FAIRBANKS NORTH STAR BOROUGH,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner North Star Alaska Housing Corporation ("North Star" or "petitioner") filed its Petition for Writ of Certiorari ("petition") on April 15, 1994. Respondents United States of America (the "United States") and Fairbanks North Star Borough (the "Borough") (collectively "respondents"), after obtaining extensions of time, filed their briefs in opposition on or about May 31, 1994 (the United States) and June 1, 1994 (the Borough). Because respondents misapprehend the applicable legal authorities and the importance of the issues, petitioner files this reply brief.

REASONS FOR GRANTING THE WRIT

Respondents fail to demonstrate in their briefs in opposition any justifiable reason why this Court should not accept review and reverse the ruling of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"). In its petition, petitioner contended, *inter alia*, that the Ninth Circuit's decision in this case conflicts with this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) ("*Bowen*"), and the Federal Circuit's decision in *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994) ("*Katz*"). In response, respondents incorrectly assert that neither *Bowen* nor *Katz* has any application to this lawsuit seeking reformation of a contract with the United States. The United States further erroneously argues that the legislative history of the Tucker Act demonstrates that it impliedly forbids equitable relief.

1. Respondents press an unwarranted and overly restrictive reading of *Bowen*. The Ninth Circuit below and other courts of appeals have failed to apply *Bowen* on the ground that it did not involve a contract with the government.[1] Two of those courts, including the Ninth Circuit in this case, expressly concluded that *Bowen* raises doubt about the continued validity of the pre-*Bowen* decisions and invited direction from this Court. 14 F.3d at 38, pet. app. 5; *Transohio Sav. Bank*, 967 F.2d at 611-614. The principles expressed in *Bowen* concerning the broad waiver of

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[1] *See* App. 5, 10; *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 611-613 (D.C. Cir. 1992); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 5 (1st Cir. 1988); *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 n. 1 (10th Cir. 1990).

immunity embodied in 5 U.S.C. § 702 should apply in actions based on government contracts.[2]

All of the circuit courts which have held that the Tucker Act impliedly forbids relief on government contract claims rely on one central but faulty assumption – that the United States Court of Federal Claims' Tucker Act jurisdiction is exclusive over contract claims against the government.[3] In *Bowen*, this Court *expressly* rejected that premise:

> "It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. . . . That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that court's jurisdiction is 'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court."

487 U.S. at 910, n. 48. Thus, this Court reasoned that *nothing* in the language of the Tucker Act precludes other

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[2] While petitioner contends that the Ninth Circuit erred in ruling that petitioner's reformation claim was based upon a contract under the Tucker Act (pet. 19), petitioner will not reiterate that argument in this reply brief. Rather, petitioner will assume for purposes of this reply brief that it pursues a contract claim.

[3] *See* pet. 15; pet. app. 10; *see also North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. den.*, 474 U.S. 931 (1985); *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d at 1532; *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986).

courts which have been granted jurisdiction from exercising that jurisdiction. This case presents a federal question; and section 702 of the APA waives sovereign immunity in this action seeking equitable relief.

In *United States v. Mitchell*, 463 U.S. 206, 216 (1983), this Court observed that the Tucker "Act makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law." Indeed, the express language of the Tucker Act treats claims founded upon "contract" the same as those founded upon "the Constitution, or any Act of Congress, or any regulation. . . . " 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1); pet. 5-6. Justice White correctly and aptly observed while dissenting from this Court's refusal to review the Ninth Circuit's decision in *North Side Lumber Co. v. Block*, 474 U.S. at 932 n. 2, that the argument advanced in this case by the United States (and adopted by the Ninth Circuit and other courts of appeals) would render the provision of 5 U.S.C. § 702 waiving sovereign immunity against claims other than those seeking money damages "a dead letter" if literally applied. *See also B. K. Instrument, Inc. v. United States*, 715 F.2d 713, 727 (2d Cir. 1983). A literal application would prohibit district courts from deciding claims seeking equitable relief based on constitutional, statutory or regulatory violations since the Tucker Act does not permit the Court of Federal Claims to decide such claims.

In *Bowen*, this Court expressly recognized that the 1976 amendment to section 702 was intended to broaden "access to the federal courts." 487 U.S. at 896. Indeed, nothing in this Court's decision in *Bowen* demonstrates that the waiver of sovereign immunity in section 702 or

the nonexclusivity of Court of Federal Claims jurisdiction varies according to whether a claim involves a contract. This Court mentioned "equitable actions for monetary relief under a contract" as an example of a claim that *could* be heard in district court under the APA. 487 U.S. at 895.

This Court should accept review to address the effect of *Bowen* on actions seeking equitable relief filed in district court under the waiver of immunity set forth in section 702 of the APA and involving contracts.

2. The United States ignores, and asks this Court to ignore, the significance of the holding of the Federal Circuit in *Katz*. The United States relies on selected language of the decision taken out of context. As aptly noted by the *Katz* dissent, at the "preliminary stage of litigation," the court "must accept the plaintiff's pleadings at face value"; those "pleadings charge a breach of contract and name the Government's agent as a defendant";[4] and the majority's holding that 5 U.S.C. § 702 of the APA provides jurisdiction is inconsistent with the majority's assertion that "the dispute [was] not between [the plaintiff] and the United States" because the APA "only provide access to sue the Government. . . . " 16 F.3d at 1212. The Federal Circuit's treatment of *Bowen* creates a conflict between the circuits.

3. The United States contends that the legislative history of the 1976 amendments of the APA support the

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[4] In *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d at 1532, the court concluded that the plaintiff's contract with a third party constituted a contract with the United States.

decision of the Ninth Circuit in this case. (Brief in opposition at 9, n. 5.) That isolated portion of the legislative history is inconclusive. Indeed, nothing in the Tucker Act or its legislative history demonstrates Congressional intent to foreclose equitable remedies.

In determining whether a statute precludes a court from reviewing agency action under the APA, a party must demonstrate by "clear and convincing evidence" that the legislature intended to restrict access to judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). The 1976 amendment to section 702 of the APA was unquestionably intended to provide aggrieved persons a ready means for bringing lawsuits for specific equitable relief against the government. Before those amendments, the system was clearly unfair. As observed by Senator Kennedy at the Senate Hearings:

> "A review of the cases – as confused as they are – reveals one certain conclusion: where sovereign immunity has been held to be a bar to suit, and where no other defenses . . . would have been applicable, unjust or irrational decisions have resulted."

House Rep. No. 94-1656, reprinted in 1976 United States Congressional Code and Administrative News ("U.S.C.C.A.N.") at 6129.

It is necessary to look to the language, history and case law of the Tucker Act to determine if Congress intended it to be the exclusive remedy. No such Congressional intent exists. Provisions of the House Report ignored by the United States establish that section 702 of the APA was not intended to affect the extent or limits of the government's monetary accountability under the

Tucker Act, but was intended to *also* make the government accountable for equitable relief:

> "[The amendment] would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus. Since [the amendment] would be limited only to actions of this type for specific relief, the recovery of money damages contained in . . . the Tucker Act governing contract actions would be unaffected."
>
> . . . .
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> "[C]laims challenging official action or no action, and seeking relief other than money damages, should not be barred by sovereign immunity. The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory relief, mandatory relief, etc.). Thus, limitations on the recovery of money damages contained in . . . the Tucker Act or similar statutes are unaffected."

H.R. Rep. 94-1656, reprinted in 1976 U.S.C.C.A.N. 6121, 6124-25, 6131.

As such, Congress expanded sovereign immunity when it amended section 702. The "amendment to Section 702 was intended to broaden the avenues for judicial review. . . . " *Bowen*, 487 U.S. at 891. Congress intended to make the United States accountable for unlawful agency action in situations where plaintiffs seek equitable relief.

The provision of the section 702 legislative history relied upon by the United States, which states that an

existing statute precludes the waiver of immunity only "when Congress has *dealt in particularity* with a claim and intended a specified remedy" to be exclusive, supports the view that the Tucker Act does not provide exclusive remedies when read in its proper context. H.R. Rep. 94-1656, reprinted in 1976 U.S.C.C.A.N. at 6133 (emphasis added). It also refutes the view that Congress intended the Tucker Act to be an implied preclusion barrier *regardless* of the lack of preclusive intent expressed in the Tucker Act:

> "It makes little sense to treat previous Congress' silence on non-damage issues as an absolute bar given Congress' new welcoming attitude towards alternative relief. Only if previous statutes permitting damages have tackled the issue of non-damage remedies discriminatingly, signaling their rejection of all, or approving some and omitting others, would it make sense to preclude those not authorized."

Webster, Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief, 49 Ohio St. L.J. 725, 734 (1988). Because Congress never made a discriminating choice among remedies when enacting or amending the Tucker Act, The existence of the Tucker Act remedial scheme should not be construed as an implied limitation on non-monetary relief. *Id.* at 734-35.

Because the Tucker Act neither expressly nor impliedly states that it was intended by Congress to constitute an exclusive remedy in contract disputes involving the government, the lower courts erred in ruling that the district court lacked jurisdiction over petitioner's claim.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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